

IN THE MATTER OF THE ARBITRATION BETWEEN:

FRATERNAL ORDER OF POLICE,
LODGE NO. 5

and

CITY OF PHILADELPHIA.

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Case No. 14 390 00190 10
Rodney Summers-Discharge

Appearances

For the City:

Shant H. Zakarian, Esquire
City Solicitor's Office

For the FOP:

Marc Gelman, Esquire
Jennings Sigmond, P.A.

Arbitrator:

Charles D. Long, Jr., Esquire

Date of Hearing:

December 20, 2010

Date of Decision:

March 29, 2011

BACKGROUND

The incident resulting in the discharge of the Grievant, Corporal Rodney Summers, which is the subject of this arbitration, occurred on the morning of March 11, 2009. The Grievant was charged with Conduct Unbecoming an Officer, Section 1.75 of the Disciplinary Code, "Repeated violations of Departmental rules and regulations and/or any other course of conduct indicating that a member has little or no regard for his/her responsibility as a member of the Department."

The Notice of Dismissal provides:

In that on Wednesday, March 11, 2009, while working as OPERATIONS Room Supervisor in the 18th District, you slapped a juvenile, R■■■■ W■■■■, in the face while he was in police custody. This assault on R■■■■ W■■■■ was unprovoked. R■■■■ W■■■■ was one of three juveniles brought in for robbery and related offenses. During the intake process, you also behaved inappropriately when you slapped one of the juveniles, telling him, "Let me set the tone in this bitch." You stated that you slapped him to gain his attention, because he was very irate and disrespectful to the officer and wasn't listening to anything the officer told him to do." Interviews conducted during this independent investigation, including yours, indicated that you have abused juvenile prisoners previously by striking/slapping them in the face/head in an effort to gain their attention and compliance while in police custody. Your actions toward these juveniles is an abuse of police authority. An independent investigation was conducted and it has been determined just cause exists to conclude that you have violated the Police Department's policies and/or disciplinary code. You have indicated that you have little or no regard for your responsibility as a member of the Philadelphia police department. Therefore, you will be dismissed after being placed on a thirty day suspension.

On 12/21/09, in the presence of Captain Joseph O'Donnell, Internal Affairs, Captain H■■■■ I■■■■ ■■■■, 18th District, Lieutenant Lorraine Dusak #283, Internal Affairs, Sergeant Malachi #5809, Internal Affairs, and Danielle Nitti, attorney, Fraternal Order of Police, you were given your Non-criminal Gniotek Warnings and an opportunity to respond to the above allegations. You chose not to respond. You were placed on an immediate 30-day suspension, with the intent to terminate.

Unable to resolve the resulting grievance, the Union filed for arbitration. A hearing was held on December 20, 2010, at which the parties presented sworn testimony, documentary evidence and closing oral argument in support of their respective positions. The following discussion and decision result from the record thus compiled.

ISSUE

Was the discharge of the Grievant for just cause?

If not, what is the appropriate remedy?

PERTINENT TESTIMONY

For the City:

Police Officer T■■■■ R■■■ has been employed by the Philadelphia Police Department since 2000, and at the time of the incident was assigned to the 18th District, where she was normally assigned to street patrol. On March 11, 2009, she was assigned to the Operations Room for the day, beginning her shift at approximately 2:30 p.m.

Early in her shift, three juveniles were brought into the Operations Room by a school beat officer. The juveniles had been arrested for robbery and P/O R■■■ described the young males as joking and boisterous. One of the juveniles stated, "We didn't rob no God damn body," to which P/O R■■■ directed the youth to watch his mouth. P/O R■■■ testified the juvenile apologized and that she considered the situation to be under control. The Grievant, for reasons unknown to P/O R■■■, got up from behind his desk and came to stand in front of the juvenile who had made the comment. The Grievant then stated, "Let me set the tone in this, bitch," and smacked the juvenile twice across his face.

P/O R█ subsequently went downstairs to change her clothes. When she returned to the Operations Room, Sergeant F█ told her one of the juveniles in the male juvenile holding cell had put something on the floor inside the door. P/O R█ determined the juvenile (not the same juvenile the Grievant had slapped earlier) had leaned an open water bottle against the door, which was spilling under the door into the Operations Room.

P/O R█ testified she went to the janitorial closet and brought a mop to the Operations Room. She then opened the door to the male juvenile holding cell, and directed the juvenile who had place the bottle in the position to spill (identified as R█ W█) to clean up the water with the mop. Because the water was in the doorway to the cell, P/O R█ held the door open so the juvenile could mop up the water. She testified the juvenile was facing her (with his back to the Grievant's desk) while he was mopping. Although the juvenile did not exhibit much interest or ambition in completing the task, P/O R█ testified he was mopping and that at no point did she feel the juvenile was either threatening her or was dangerous to anyone else in the Operations Room.

A brief time after the juvenile started mopping, the Grievant rose from his desk, came up behind the juvenile and punched him with a closed fist in the back of the head. The juvenile dropped the mop, turned to face the Grievant and asked why the Grievant had punched him. P/O R█ testified the Grievant did not respond but grabbed the juvenile and began hitting him. The Grievant then flung the juvenile into a paper shredder and then onto a desk. During the initial seconds of the melee, P/O R█ testified she was trying to close the door to the cell. When she turned back around, she grabbed the juvenile by the waist as he was sliding across the desk, in an effort to keep him from hitting the floor. P/O R█ then pulled the juvenile to his feet and pushed him against the wall just outside the cell door. The

Grievant came around the desk and punched the juvenile over P/O R■■■■ head. The juvenile reached out and grabbed the front of the Grievant's shirt. The Grievant ordered the juvenile to "let go of my shirt". P/O R■■■■ repeated the instruction and when the juvenile released the Grievant's shirt, she pushed the juvenile back into the holding cell and secured the door.

P/O R■■■■ testified she believed it was her duty (under the Department's Use of Force policy) to protect the juvenile because it was clear to her that the Grievant had used greater force than was necessary under the circumstance.

On cross-examination, P/O R■■■■ testified she did not know at the time of the incident why juvenile W■■■■ was in custody because he had been admitted prior to the start of her shift. She also testified that Sgt. F■■■■ reported the incident between the Grievant and Juvenile W■■■■ to a superior officer.

A couple of days after the incident, P/O R■■■■ was verbally reprimanded for providing the juvenile with the mop and was told that officers were not permitted to require prisoners to clean up their messes.

Sergeant J■■■■ F■■■■ has been assigned to the 18th District for approximately three years. On the day of the incident, she was working on the computer on the Operations Room Supervisor's desk. She testified that desk is located directly in front of the juvenile holding cells, one for male juveniles and one for females. The cells have large, clear paned doors so Operations Room staff can observe the detainees.

While she was working, Sgt. F■■■■ looked up and saw one of the male juveniles bent over inside the door of the cell. There is a metal frame around the door, so Sgt. F■■■■ was unable to see what he was doing on the floor. She requested P/O R■■■■ check on the juvenile. P/O R■■■■ responded, "Sarge, he's pouring water or something outside the cell."

Sgt. F████ testified that P/O R████ left the Operations Room and returned with an industrial mop. She then opened the cell door and instructed the offending juvenile to come out and mop up his mess. The juvenile complied but was not doing a very thorough job. P/O R████ was directly supervising the juvenile and directing him to clean up the spots he missed.

Sgt. F████ testified that until this point, the Grievant had been standing near her. He then walked around the desk to P/O R████ and the juvenile. She testified she did know that the juvenile, R████ W████, was being detained for having assaulted a school police officer, but she did not observe him being aggressive, hostile or threatening toward P/O R████, the Grievant or any one else in the Operations Room.

Sgt. F████ continued her work on the computer but looked up intermittently because she was aware that the cell door was open during the mopping. She testified she looked up from the computer when she heard a thumping sound. She saw the Grievant and the juvenile "wrestling". She did not witness the action which precipitated the altercation, but when she heard the thumping she was concerned that the juvenile might be trying to escape. Sgt. F████ testified she observed the Grievant strike the juvenile a number of times with his hand, although she did not recall whether his hand was open or closed in a fist. She also observed the Grievant pull the juvenile across the desk, backwards, and that the juvenile almost hit the floor. She did not hear the Grievant speak to the juvenile. She observed the Grievant engage the juvenile twice and observed the Grievant shoving the juvenile into the shredder. She testified she observed the Grievant was the aggressor in the altercation.

Although it took a second to react, Sgt. F████ did go around the desk and tried to pull the Grievant away from the juvenile. She testified the Grievant pulled away from her and that she was unsuccessful in her attempts to restrain the Grievant. P/O R████ was

simultaneously trying to grab the juvenile and was ultimately successful in returning him to the cell.

Sgt. F■■■■ testified that all Philadelphia police officers are trained on the appropriate use of force and that force should only be used to prevent injury. All police officers are required to intercede to stop the use of excessive force, and she testified she could have been subject to discipline if she failed to act. She also testified she had never received police training in which she was taught to strike a person in the manner she observed the Grievant striking the juvenile.

After the incident, Sgt. F■■■■ spoke to the Grievant. She checked to be sure that he was not injured and then asked what had happened. The Grievant told her he thought the juvenile was "about to get aggressive with the mop." Sgt. F■■■■ responded, "This doesn't look good." She reported the incident to the covering Lieutenant in the 12th District, who directed her to contact IAD and her Captain.

Sgt. F■■■■ also testified police officers are required to complete a Form 75-48 anytime an officer is involved in an altercation or is made aware of a situation. She testified she was sure she completed a 75-48 on March 11, 2009, but when she was presented with a copy of the form at the arbitration hearing, she testified the writing on the form was not hers. She testified that the signature was hers but the written report was not in her hand writing and was not consistent with her recollection of the events of that afternoon. She did not know who may have written the report, and she did not recall asking anyone to complete the form for her.

Lt. P.F. P■■■■ has been employed by the Philadelphia Police Department for ten years and is currently assigned as a shift commander and Administrative Lieutenant in the 9th

District. He was the Department Advocate when this case was presented to the Police Board of Inquiry ("PBI"). His responsibilities in that position were "analogous to a prosecutor's position, in internal affairs matters." He is assigned a case to present to the PBI after it has been investigated by the Internal Affairs Division ("IAD"). The Charging Department then determines that charges are appropriate and identifies the charges to be made against the officer. The investigation in this case began with a complaint by P/O R [REDACTED]

Lt. P [REDACTED] testified the penalty range for a violation of Rule 1.75 is thirty days to dismissal. He testified Rule 1.75 could be violated either by a course of conduct or a single event, if it was so egregious that it could be concluded that the officer had little or no regard for his responsibilities. He also testified the PBI was unanimous in its recommendation to dismiss the Grievant. The Police Commissioner, however, is solely responsible for the final decision and imposition of appropriate discipline.

For the FOP:

The Grievant, **Rodney Summers** has been employed by the Philadelphia Police Department since March, 1997. He has been assigned to the 18th District since he was promoted to Corporal approximately four to five years prior to the incidents in question. He was the Operations Room Supervisor and was responsible for preparing reports for Sergeants and Lieutenants, preparing work and fleet assignments daily for the officers on street duty, and managing the juvenile and adult holding cells, including being responsible for the intake, discharge and safety of all prisoners. Anyone bringing a prisoner into the 18th District is required to immediately notify the Operations Room Supervisor on duty. At the beginning of each shift the Operations Room Supervisor reviews the paperwork for any prisoners who are

in custody as of the shift change.

The Grievant was on duty when R■■■■ W■■■■ was brought into the 18th District and was told the juvenile had assaulted “a teacher or a police officer”. On that day, there were approximately 5 – 6 male juveniles in the holding cell. The Grievant testified the juvenile holding cell poses of a safety risk because it is physically located in the Operations Room, where there are a number of other police officers and civilians working.

He testified the proper procedure for cleaning up a mess (like spilled water) is to contact the turnkey, who is responsible to go into cells and clean up messes. Neither the turnkey nor anyone in the Operations Room carries weapons because of safety concerns.

The Grievant admits that he had “contact” with one of three juveniles who were brought in on robbery charges. He testified one of the juveniles was unruly, disruptive, and was not complying with the directions given to him by P/O R■■■■. When P/O R■■■■ instructed the youth to empty his pockets and take off his belt, he threw them onto a table. He testified that he perceived the situation to be escalating because the juvenile was “acting out” and riling up the other two juveniles. The Grievant testified he walked over to the juvenile, told him, “You are not going to act like this” and then slapped the juvenile on each side of his face and told him to calm down. The Grievant stated the slap was effective and fell under the Step 3 of the use of force continuum as it was a “hands-on technique” in order to exert control in the situation.

Later in the day, the Grievant testified the male juveniles in the holding cell were rowdy, yelling and banging on the door. He observed one of the juveniles dumped his water on the floor, under the cell door, creating a slip and fall hazard in the Operations Room. P/O R■■■■ told the juvenile he was going to have to clean the mess up. She then left the Operations

Room, he presumed to go and get paper towels or napkins for the juvenile to use. At the time, the Grievant was working at his desk and did not notice that P/O R■■■ had returned with an industrial mop until he heard her yelling, "Clean it up. Clean it up." The Grievant testified he was concerned because P/O R■■■ was not normally assigned to the Operations Room and he was very concerned that she had provided the juvenile, essentially, with a weapon.

The Grievant testified he stood up from his desk and walked up behind the juvenile, R■■■ W■■■. As he approached, the Grievant observed that W■■■ switched the heavy mop to his dominant hand and stood there. The Grievant considered this action to be aggressive in nature, and intervened by "tapping" W■■■ on the side of his face (from behind) with an open hand. The Grievant testified W■■■ turned around and asked, "Why did you hit me?", threw down the mop and took a swing at the Grievant. The Grievant then grabbed W■■■ arm. W■■■ also grabbed the Grievant's arm and they struggled. During this altercation W■■■ did end up at one point with his back against the shredder. The Grievant attempted to "leg sweep" the juvenile, but the move was only partially effective and W■■■ ended up on the table. The Grievant testified he was attempting to get W■■■ back into the cell. He denied that he ever "punched" or "attacked" W■■■. He testified there were no injuries to either W■■■ or himself as a result of this incident.

The Grievant also testified he has never previously assaulted a juvenile prisoner nor had any prior discipline related to inappropriate use of force. He was responsible for more than 2,000 juvenile prisoners during these four to five years as 18th District Operations Room Supervisor. Until P/O R■■■ gave W■■■ the mop, March 11, 2009 was a routine day in the 18th District.

On cross-examination, the Grievant acknowledged he is familiar with and has received training on the acceptable use of force as set forth in Directive 22. He testified a slap in the face can constitute an acceptable use of force but is not a control move. He testified that he was concerned that neither Sgt. F■■■■ nor P/O R■■■ had extensive experience in dealing with juvenile prisoners. In his opinion, P/O R■■■ placed many people in danger when she provided W■■■ with a heavy-duty industrial mop. While the Grievant was heavier than W■■■ he testified the fact that W■■■ had a weapon made a relative size difference immaterial.

Finally, he testified that he had a friendly working relationship with both Sgt. F■■■■ and P/O R■■■, and he did not know of any reason that either would not tell the truth regarding the incidents of March 11, 2009.

PRINCIPAL POSITIONS OF THE PARTIES

City: The City argues this is a clear-cut case of a violation of Directive 22 (the Use of Force policy) and of §1.75 of the Disciplinary Code. The Grievant admits that on March 11, 2009, he slapped a juvenile in the face twice and later was involved in a fight with a second juvenile prisoner, in which he initiated contact. Both P/O R■■■ and Sgt. F■■■■ credibly testified the later altercation with the juvenile was unwarranted and unjustified, and that they each believed the Grievant's conduct was inappropriate under the circumstances.

A fair and complete investigation was conducted of the incident. The Grievant has been represented throughout the disciplinary process. The Grievant admitted to receiving training on the use of force pursuant to Directive 22 and to understanding the appropriate progression of necessary force through the progression from mere physical presence to

deadly force. The Grievant failed to act in accordance with his training or the standards set forth in Directive 22 in his interactions with the two juveniles on March 11, 2009. His actions cannot reasonably be considered necessary or appropriate to control either situation. Physical assault of a juvenile is neither condoned nor required under the circumstances of these incidents.

The record is sufficient to establish there was just cause of the Grievant's termination and the City requests the grievance be denied.

FOP: The FOP argues the range of discipline for violating §1.75 allows but does not require dismissal. It asserts that the slaps administered by the Grievant in the first incident were intended to control an escalating situation, and proved to be effective. Had there not been a second incident that afternoon, the slaps would probably not be in issue now.

The FOP asserts Sgt. F█████ testimony lacks probative value because she, by her own admission, did not observe the initial contact between the Grievant and juvenile W█████. When the Grievant spoke with her immediately following the incident, he expressed his subjective belief that others were in danger because W█████ had taken an offensive posture with the mop; this constitutes a contemporaneous utterance which should be accorded great weight in understanding the Grievant's state of mind at the time.

When an officer's job is on the line, just cause requires the highest level of scrutiny of the evidence. The 75-48 signed by Sgt. F█████ is very problematic because the City has attempted to completely discredit the document on which it relied to assess the discipline against the Grievant. If the 75-48 is accepted as it is written, it states that W█████ was "very hostile," thereby justifying that the Grievant's action was warranted. The FOP also asserts

that P/O R■■■■ testimony was less that credible, because she was too certain and "trying too hard."

The Grievant had a twelve year, discipline-free, career with the Philadelphia Police Department. His actions concerning the R■■■■ W■■■■ incident must be understood within the context of his perception of the situation. The Grievant knew that W■■■■ was detained because he was accused of assaulting a school police officer earlier in the day, P/O R■■■■ had just provided W■■■■ with a weapon (the mop) in an unsecured area and the Grievant observed that W■■■■ had taken an offensive posture. Under these circumstances, the Grievant took appropriate action to protect all persons in the Operations Room.

Finally, the FOP argues the discipline assessed against the Grievant was disproportionate. The Grievant was placed in a position of having to respond as he did because P/O R■■■■ exercised very poor judgment by providing W■■■■ with a weapon; for this she received a written reprimand. The Grievant was forced to respond to protect others; for this he was terminated. But for P/O R■■■■ lack of judgment, the Grievant would still be employed as a Philadelphia Police Officer.

The FOP requests the grievance be sustained as there was no just cause for termination of the Grievant. It requests the Grievant be reinstated and made whole.

DISCUSSION

The just cause standard consists of two (2) essential elements: 1) proof of an underlying incident; and 2) an appropriate level of discipline considering all of the relevant surrounding circumstances. The burden of proving both elements rests with the employer.

The quantum of proof required for an employer to sustain its burden in the arbitration

of a discharge case is that the employer must convince the arbitrator (whom the parties have selected) that the discharge at issue was fair punishment for a proven infraction and one clearly supported by the evidence.

It is not unusual for the testimony of witnesses to differ as to material facts. Credibility considerations do not necessarily establish truth; rather, they serve as reasonable indicators of which of the conflicting testimony most likely reflects what actually occurred. In this case, whether P/O R■■■■ or anyone else in the Operations Room was in imminent danger from the juvenile with the mop is not dispositive of the grievance.

The Grievant admits that he slapped a juvenile twice in the face early in the shift and that he was involved in a physical altercation with a different juvenile later in the afternoon. He admitted that he initiated physical contact with R■■■■ W■■■■ from behind, although he contends that he “tapped” the juvenile “with an open hand on the side of the face.” He testified, consistent with P/O R■■■■, that Mr. W■■■■ responded by asking, “Why did you hit me?”

The Grievant’s testimony that W■■■■ then took a swing at him, however, is not corroborated by other testimony. I find P/O R■■■■ testimony to be credible and consistent with the statement she gave to her Commanding Officer in the 18th District on March 15, 2009. The Grievant’s testimony that he became engaged in a scuffle with the juvenile, in which the juvenile was pushed into a paper shredder and ended up with the juvenile on his back on a table, is also consistent with the testimony of both P/O R■■■■ and Sgt. F■■■■.

In order to conclude that the Grievant committed repeated violations of the Disciplinary Code, evidence of the pattern or occurrence of such incidents must be established. Further, the employer must establish that the Grievant had knowledge of the

nature of the violation and that his conduct was of such severity as to establish that he has little regard for his duties and/or for his fellow officers.

The evidence presented in this case establishes that the Grievant did (by his own admission) strike two juvenile prisoners in two separate incidents on March 11, 2009. The Grievant also admitted that he was familiar with the appropriate use of force continuum and that he had received training on Directive 22. He also acknowledged that slapping a prisoner in the face is not taught as a control move, but he asserted that because it was effective in this incident in quieting a disruptive juvenile, it was an effective control move under these circumstances.

The Grievant admitted he initiated physical contact with R [REDACTED] W [REDACTED] on the side of his head, from behind. It is not disputed that this initial contact precipitated the subsequent altercation. There is also no dispute that the Grievant did not first issue a verbal warning or persuasion to W [REDACTED] before he made physical contact.

Whether I agree with the severity of discharge of the Grievant is of no consequence. It is not my function to second-guess the decision of the Police Commissioner in this regard. While an arbitrator has the authority to mitigate discipline which the record evidence convincingly establishes is excessive, I note that here the range of the prescribed penalty for a violation of Rule 1.75 is, "30 days to dismissal". Based upon careful consideration of the evidence and the arguments presented, the decision to terminate the Grievant is within the range of discipline and is supported by the record.

DECISION

Consistent with the foregoing discussion, the record establishes to my satisfaction that the Employer has, by clear and convincing evidence, satisfied its burden of establishing just cause for the Grievant's discharge.

The grievance is denied.

March 29, 2011

(Date)

Charles D. Long, Jr.

Charles D. Long, J., Esquire
Arbitrator